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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 393

LEROY GARBER,

Appellant,

—v.—

THE STATE OF KANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N.Y. 10021

E. DEXTER GALLOWAY
303 First National Bank Building
Hutchinson, Kansas

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, N.Y. 10010

Attorneys for Appellant

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Argument

At pages 8 and 9 of Appellee's Motion to Dismiss, it is contended that this Court has never questioned the power of the state to compel the education of children. But Appellant does not question the existence of some quantum of such compulsory power. See Jurisdictional Statement, pp. 17-18. The question is rather the *extent* of such power: What are the constitutional limits?

This Court has indeed noted the due process questions raised by state educational requirements; see *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Bartels* v. *Iowa*, 262 U.S. 404 (1923); *Meyer* v. *Nebraska*, 262 U.S. 390

(1923). This Court's concern for the due process ramifications of school regulatory statutes is particularly apparent in *Farrington* v. *Tokushige*, 273 U.S. 284 (1927). In *Farrington* this Court affirmed the issuance of a temporary injunction forbidding Hawaiian territorial officials from enforcing a statute imposing certain regulations[1] on private schools.

This Court noted that the government has no right to give:

> "affirmative direction concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks." 273 U.S. at 298.[2]

The underlying issues in *Farrington* are similar to the questions raised by the present case. Thus, in *Farrington* this Court noted that the statute went beyond mere regulation, and that its enforcement would destroy the schools, which were subject to such regulation. *Ibid.* The present case likewise involves a statute (and its construction by the Supreme Court of Kansas), the effect of which may be to destroy the religion of appellant and all of his co-religionists in the State of Kansas. See Jurisdictional Statement, p. 11.

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[1] The statute limited pupils' attendance at foreign language schools to one hour per day; and required that such pupils also regularly attend public schools; that textbooks be approved by the territory; that a fee be paid of $1.00 per pupil; and that teachers obtain a permit and demonstrate a knowledge of American institutions and a command of the English language.

[2] There are definite due process limits on the extent to which a state can attempt to "standardize its children." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). "Compulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 604, 641 (1943).

The decision in *Farrington*, which appears to contradict a major premise of Appellee's Motion to Dismiss, gives further support to appellant's contention that this case presents substantial Federal constitutional questions.[1] Consideration and resolution of these questions merit plenary argument before the Court.

Respectfully submitted,

MARVIN M. KARPATKIN
E. DEXTER GALLOWAY
MELVIN L. WULF
ELEANOR HOLMES NORTON
Attorneys for Appellant[*]

September, 1967.

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[1] For a recent discussion of many of the problems in this case, see Note, "The Right Not to Be Modern Men: The Amish and Compulsory Education", 53 Va. L. Rev. 925 (1967).

[*] Appellant's attorneys gratefully acknowledge the research assistance of Mr. Neal Raines, third year student at Northwestern University School of Law.